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MONTANA PROSECUTOR

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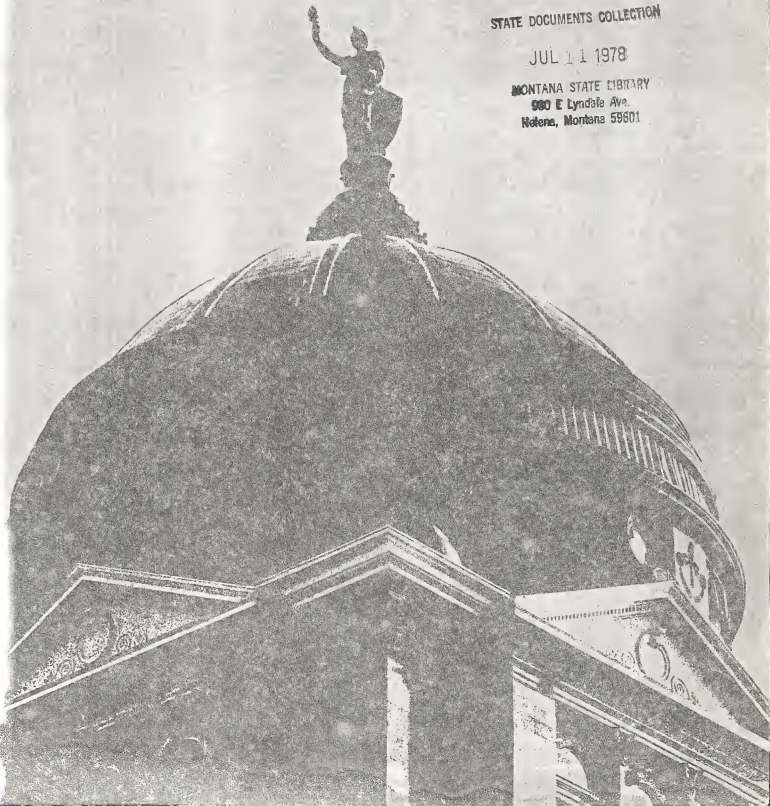


INTRODUCTORY NOTES

Several jurisdictions have encountered problems with some of their DWI cases due to the recent departure of one of the analyzing chemists from the Criminal Investigation Lab in Missoula. If you have any questions about how to proceed, feel free to call upon CPS. One successful technique utilized in Kalispell by Russell Jones is to present the chemical testimony through Arnold Melnikoff, Chief of the Criminal Investigation Lab, even though actual testing was conducted by a laboratory assistant not present at trial. In presenting Mr. Melnikoff's testimony, Russell Jones first qualified him as an expert and then qualified his absent assistant as an expert. Then Mr. Melnikoff reviews the extent of his laboratory supervision, selection of testing procedures and methods of recording test results in a laboratory log. Then the specific test results are introduced into evidence in the form of a laboratory log photocopy under the auspices of Rule 803(6) of the Montana Rules of Evidence. Even though Rule 803(8) possibly excludes such results, Rule 803(6) does not. As authority, Russell Jones relied on State v. Boehme, ___W.2d___, 430 P.2d 537 (1967) and Klaus v. Hillberry, 157 Mont. 277, 485 P.2d 54 (1971). Again, if you have problems feel free to call upon Russell Jones or CPS.

The Montana County Attorney's Association convention will take place at Fairmont, July 26, 1978, to July 29, 1978. Registration begins at 10:30 a.m. on July 26, 1978. A final schedule of events has not been formulated as yet, but when it is completed, all members will be notified.

Senate Bill 35 has been introduced and is before the Senate Committee on the Judiciary, Subcommittee on Constitution. If passed it will eliminate prosecutorial immunity, impose vicarious liability on the chief prosecutor of a jurisdiction, and encourage proliferation of law suits challenging prosecutorial decisions, in addition to having various other side effects. If you wish to contact members of the committee and our own Senators, you should do so immediately. A list of the members of the Senate Committee is enclosed.

Any members wishing to present resolutions to be considered at the annual convention are encouraged to draft them and mail a copy to CPS. One resolution has been presented so far dealing with changing the name of the annual convention to the Montana County Attorney's Association Summer Workshop.

Included within this issue are two articles, one entitled "Crimes Against The Elderly" and one entitled "Youth Crime: A National Shame", courtesy of the California District Attorney's Association.

Also included is a monograph on sentencing and the parole and nondangerous offender provisions, prepared by Mike McCarter of the Legal Services Division.

RECENT CASES AND NOTES

WARRANTLESS SEARCH: EXIGENT CIRCUMSTANCES; REASONABLENESS

Where police received an anonymous telephone call indicating that a large quantity of narcotics was present in the basement at a certain address and that it could be seen through a lighted basement window, and where a police officer arrived at the address and observed through the specified basement window three men and a major narcotics packaging operation, the police officer, who was accompanied by only one other officer, acted reasonably in obtaining additional police assistance, and the fact that the police did not immediately enter the premises did not render unlawful a warrantless entry made by the police some 30 to 40 minutes after the initial observation through the window. The Court ruled that the police were justified in entering and searching the premises without a warrant some 30 to 40 minutes after the initial observation through the basement window was made, in view of the possibility that narcotics would be removed or destroyed, in view of the danger of the stake-out, and in view of the fact that it would have taken about two hours to obtain a search warrant through the existing procedures. Before conducting the warrantless search the police requested and obtained the legal advise of an assistant United States Attorney, and the Court found that the advice of the attorney to conduct a warrantless entry and search of the premises was relevant on the question of whether the decision by the police to proceed without a warrant was reasonable. "The prosecutor's advice in this instance is not, of course, conclusive. But the action of the police in both seeking and following that advice is relevant to the question of whether the decision by the police to proceed without a warrant was reasonable." United States v. Johnson, 561 F.2d 832, D.C., 1977).

SEARCH INCIDENT TO ARREST: BOOKING SEARCHES; MINOR OFFENSES

The Supreme Court of Alaska has held that when a defendant is arrested and brought to jail for a minor offense for which bail has already been set in a bail schedule, he should be allowed a reasonable opportunity to attempt to raise bail before being subjected to the booking procedures and an incidental inventory search. Thus, the Court invalidated a jail house inventory search of defendant's wallet where defendant's employer had arrived and made bail within minutes of the misdemeanor arrest. Zehrung v. State, 569 P.2d 189, Alaska, 1977).

OBSCENITY: SPECIFIC CASES; MOVIES; EXPERT TESTIMONY

Expert testimony was not required to determine whether the subject matter of a film would appeal to the prurient interest of a deviate group where it depicted defecation during the act of sexual intercourse. State v. Tidyman, 568 P.2d 666, Ore.App., 1977).

STOP AND FRISK: USE OF FORCE

A proper stop of the defendant's vans made by police officers was not transformed into a full-blown arrest merely because one of the officers drew his weapon after they had identified themselves as the police and ordered the vans to stop, but one van began to move and suddenly lurched forward. As the Court stated: "A police officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop, and the use of such force does not transform a proper stop into an arrest...In the instant case, a weapon was not drawn until, after the officers had indentified themselves and ordered the vans to stop, one van began to move and then suddenly lurch forward." United States v. Thompson, 558 F.2d 522, 9th Cir., 1977.

RIGHT TO PRIVACY: OPEN PATCH OF MARIJUANA

Defendant had no reasonable expectation of privacy with respect to an open patch of marijuana growing on his property which was in view from a police helicopter flying at a reasonable height. The helicopter was flying at approximately 300 feet during its observation. Factors that contributed to a finding of reasonableness in the police activity and a lack of reasonable expectation of privacy by the defendant included the fact that this was a sparsely populated area where there were occasional helicopter flights by the National Guard and "crop-dusters" and there was testimony that other aircraft, including tour, pleasure and business planes, flew over the area each day. State v. Stachler, 570 P.2d 1323, Hawaii, 1977.

MIRANDA: WAIVER; ELECTION TO REMAIN SILENT

Merely because a defendant remains silent after being given his Miranda warnings does not automatically signify an election on his part to remain silent, which would preclude any subsequent questioning, in the absence of a clear, intelligent and understanding waiver of the right to remain silent. Additionally, a statement by the defendant, "[why] you've done ask me a question I can't answer", was merely an expression of an inability to answer, rather than an invocation of the Fifth Amendment right to remain silent". Taylor v. Riddle, 563 F.2d 133, 4th Cir., 1977.

WEAPONS: DANGEROUS WEAPONS; PELLET PISTOL

It has been held that evidence that a .22 calibre, gas-operated pellet pistol used by a defendant was a "dangerous weapon" was sufficient to go to the jury in an armed robbery prosecution. The Court ruled admissible the testimony of a prosecution expert explaining how he had test-fired the pellet gun and his opinion that it was dangerous because its projectile could penetrate four thicknesses of cardboard. People v. Greer, 368 N.E.2d 996, Ill. App., 1977.

CONSPIRACY: UNDERCOVER POLICE OFFICER AS CO-CONSPIRATOR

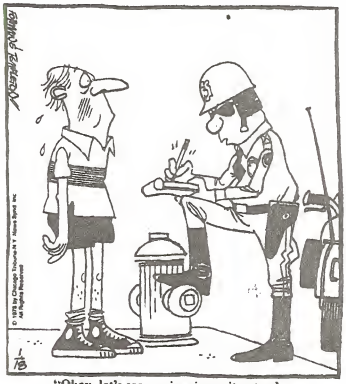
A New Jersey appellate court has ruled that a defendant can be convicted of conspiracy even though the person with whom she allegedly conspired was actually an undercover police officer. The opinion of the Court is helpful, because it reviews the law from various jurisdictions on the question. State v. Lavary, 377 A.2d 1255, N.J.App., 1977.

WEAPONS: DANGEROUS OR DEADLY WEAPONS; AIR GUN

An air gun is a "gun" within the meaning of an instruction defining a dangerous or deadly weapon. People v. Malone, 138 Cal.Rptr. 397, Cal.App., 1977.

INSTRUCTIONS: MURDER; BRAIN DEATH

The Supreme Judicial Court of Massachusetts has held that an instruction that "brain death" would satisfy the essential element of the crime of murder and would occur upon a total and irreversible cessation of spontaneous brain functions and the failure of further attempts at resuscitation and continued support of maintenance, was not erroneous as depriving the defendant of the possible defense that the victim would have lived more than a year and a day had it not been for the decision to disconnect a respirator made by the doctor and the victim's family. Commonwealth v. Golton, ____N.E.2d____, Mass., 1977.



"Okay, let's see . . . jogging suit not color co-ordinated . . . not wearing European shoes . . . no sweatbands . . . running without a stopwatch . . ."

ASPORTATION

Asportation for inches with the requisite intent to deprive the owner is sufficient to sustain a conviction for grand theft. Refusing to give defendant's requested instruction that it was necessary for him to take the stolen property outside the store was correct. State v. White, 576 P.2d 138, Ariz., 1978.

AUTHORITY TO PROSECUTE

Unless the legislature indicates otherwise, a request from the County Attorney to the Attorney General for help in prosecuting a case is a sufficient showing of necessity to satisfy the statute and to authorize the Attorney General to prosecute the case. State v. Duran, 575 P.2d 1265, 1978.

CONSTITUTIONALITY OF STATUTE

A hardcore violator of a statute cannot complain that the fringes of the statute may be unconstitutionally imprecise. The defendant's conduct in altering state records to secure money for himself fit squarely within the proscribed conduct of altering state records, so defendant lacked standing to contest the statute's constitutionality. State v. Duran, 575 P.2d 1265, Ariz., 1978.

DEATH PENALTY - DURESS

Evidence that defendant planned the murder because he disliked the victim, hit him in the head, robbed him, tied him up, dumped him in a mineshaft and dropped rocks and dirt on him as he struggled at the bottom, cleaned up the scene, and on the way into town assisted a stranded motorist was sufficient to rebut defendant's claim he acted in fear of decedent. (Although not explicitly stated, a necessary holding of the case is that this killing constituted killing in a cruel, heinous manner.) State v. Bishop (Ariz.) 576 P.2d 122, 1978.

FIFTH AMENDMENT

Where the defendant talked extensively to officers at the scene, it was not error for the prosecutor to cross-examine him about why he did not tell the arresting officers of two armed men that he first mentioned on direct examination. State v. Tuzon (Ariz.) 575 P.2d 1231, 1978.

COMPETENCY OF COUNSEL

A defendant who knowingly and intelligently waives his right to counsel cannot complain that his self-representation was ineffective. United States ex rel Smith v. Pavich (7th Cir.) 568 F.2d 33, 1978.

JUVENILES - MIRANDA

Juvenile Rule 18, which requires that a juvenile be informed of his rights, is satisfied by giving Miranda warnings. The court also noted that the absence of the juvenile's parents during questioning was only one factor to consider in determining whether his statements were voluntary. Matter of Appeal In Maricopa Cty. Juv., Etc. (Ariz.) 576 P.2d 143, 1978.

PRIOR CONVICTIONS

Impeachment of defendant with a prior conviction of open end attempted burglary, for which he was still on probation, was proper since an open end offense is considered a felony unless and until the sentencing court designates the offense as a misdemeanor. State v. Tuzon (Ariz.) 575 P.2d 1231, 1978.

PROSECUTOR - WITNESSES

Granting a protective order to prevent the defendant from calling the prosecutor as a witness was proper where the prosecutor's evidence would merely have been cumulative. There were other witnesses who could testify about the condition of the door and a witness's inconsistent statements. State v. Tuzon (Ariz.) 575 P.2d 1231, 1978.

Where defendant initiated the talk with the prosecutor, and a deputy, who remained outside the open door to protect the prosecutor, heard the conversation and established the voluntariness of the confession, it was unnecessary for the prosecutor to disqualify himself even though the defense called him as a witness. The prosecutor's testimony, although relevant, was merely cumulative and corroborative; the tactic of calling him to disqualify him is not approved. State v. Bishop (Ariz.) 576 P.2d 122, 1978.

SELF-DEFENSE

Self-defense is an all or nothing defense. An honest, good-faith, but unreasonable belief in the necessity to use deadly force does not reduce the degree of the crime; therefore it was unnecessary to give an involuntary manslaughter jury instruction. State v. Tuzon (Arix.) 575 P.2d 1231, 1978.

BOND

A guy convicted of possession of 23 tons of marijuana (for personal use no doubt) seeks bail release pending appeal. Judge spends nine pages telling defendant he's got to be kidding, case is a good discussion of bail. United States v. Miranda (S.D.Fla.) 442 F.Supp. 786, 1977.

VOLUNTARINESS OF STATEMENTS

Defendant's confession was voluntary where appellant was continuously given his Miranda rights, he refused to answer some questions, there was no evidence he requested counsel, he was not questioned for long periods or under suspicious circumstances, and there were no allegations of threats, etc. State v. Bishop, (Ariz.) 576 P.2d 122, 1978.

The absence of parents during questioning and a suggestion that defendant confront the "accomplices" defendant initially blamed, did not make the juvenile's confession involuntary where he was 16 years old, had a ninth grade education, was in good health and was not threatened. The court refuses to adopt a per se exclusionary rule for juvenile confessions in the juvenile's parents' absence, holding the absence merely one factor to be considered. State v. Jackson, (Ariz.) 576 P.2d 129, 1978.

ARMED ROBBERY

Where the charge is armed robbery, the State need not present direct proof of victim's fear because an inference of fear may be drawn from the act of robbery. Testimony by victims that defendant pulled a gun and demanded money is sufficient to prove armed robbery. Cox v. State, (Ind.) 372 N.E.2d 176, 1978.

ARREST

Approaching a man matching the description of the burglar, who was standing fifty feet from where the burglar was last seen, with drawn guns, handcuffing him, placing him in the squad car and taking him back to the scene was a temporary detention, not an arrest, since the officers detained him for field identification and told him that he was under arrest for burglary only after the victims identified him as the burglar. People v. Hidalgo, (App.) 144 Cal.Rptr. 515, 1978.

ARREST - PROBABLE CAUSE

A warrantless arrest by an officer who did not have probable cause to arrest the defendant by himself was upheld, since it is the collective knowledge of all officers involved in the arrest which determines probable cause. Here, defendant matched the description of the robber, his car matched the description given of the getaway car, he was in the area at the time, a hair sample from him matched hairs in a cap that the robber left, defendant had a prior record, etc. State v. Buckner, (Kan.) 574 P.2d 918, 1977.

CROSS-EXAMINATION

Prosecutor asked defendant "Now, ...what kind of business were you in, other than robbing and killing people?" Held error, but not reversible, where court promptly sustained defendant's objection and gave jury curative instruction. State v. Martin, (N.C.) 240 S.Ed.2d 415, 1978.

DIRECT EXAMINATION

Court has discretion to permit leading questions, and there was no abuse in permitting leading questions to 12 year old victim of rape and another witness who was illiterate. State v. Hensley, (N.C.) 240 S.E.2d 332, 1978.

GUILTY PLEA - SENTENCE

Giving a harsher sentence than the plea bargain called for, when the judge said he went along with 90-95% of the plea bargains, is held proper where the judge told the defendant that the judge was not bound by the plea agreement. (The case is also included because of the reasoning of the judge, included and concurred with in the opinion, about why he gave the harsher sentence.) People v. Lambrechts (Ill.) 372 N.E.2d 641, 1977.

INFORMANTS

Mere speculation as to usefulness of informant's testimony to defendant is insufficient to justify disclosure of informant's identity and defendant must indicate some concrete circumstances which would overcome public policy encouraging flow of information and informant's private interest in his own safety. This burden was not met where informant merely made the initial arrangements for the sale between the narcs and the defendant. United States v. Estrella (1st Cir.) 567 F.2d 1151, 1977.

PRELIMINARY HEARING

The preliminary hearing judge's conclusions that a dismissal was required because all the testimony about the rape was hearsay, and that grabbing a sleeping woman by the breasts so hard it left bruises was insufficient force to support a forcible rape charge, were both wrong as a matter of law, and the dismissal of the charges was reversible error. People ex rel Van Meveren v. Dist. Court, Etc. (Colo.) 575 P.2d 405, 1978.

PRIOR BAD ACTS

Testimony by undercover agent as to conversations with defendant concerning prior drug transactions was properly admitted where reference to prior acts was inextricably interwoven with bargaining between defendant and agent concerning price and quantity of present drug sale, and so was highly probative, relating directly to the crime charged, without being overly prejudicial. People v. Vails (N.Y.) 372 N.E.2d 320, 1977.

SEARCH & SEIZURE

A policeman who lacks the precise level of information necessary for probable cause to arrest is not required to simply shrug his shoulders and allow crime to occur or a criminal to escape, but can adapt a stop of a person as an intermediate step. Where a policeman stopped the defendant and was given demonstrably false explanation (stereo didn't have a needle - actually did) by a defendant as to his activities, officer then had probable cause to arrest. Commonwealth v. LeSeuer (Pa.Super.) 382 A.2d 127, 1977.

SEARCH WARRANTS

An officer who was serving a search warrant on a pornographic film-maker/distributor acted properly in reading advertising brochures sitting out in the open, then using the knowledge he gained in an affidavit to get a search warrant to seize the brochures and two films described therein. (Good discussion of search and seizure problems relating to pornography.) People v. Apelby (Cal.App.) 144 Cal.Rptr. 78, 1978.

SENTENCE - PROBATION

A realistic opinion from a special California Supreme Court, holds inter alia, that attending a university probably will not reform a 50 year old three-time loser child molester, that while rehabilitation is more likely out of prison, rehabilitation is unlikely and the risk to small children isn't worth it. Further, the court notes defendant's "community involvement" in this case was similar to his first conviction when as a scoutmaster he molested his boy scouts, and holds that granting him probation was an abuse of discretion. People v. Warner (Cal.) 143 Cal.Rptr. 885, 1978.

WITNESSES

Testimony by police officer relating to time of warrant search of defendant's home, which included statement that after he knocked, officer heard shuffling noises and believed that evidence or contraband was being destroyed, was properly admitted. Although the statement resembles an opinion, it is not. It was merely a reasonable and natural inference to be drawn from a common occurrence and was therefore not subject to exclusion as opinion. State v. Stripling (La.) 354 So.2d 1297, 1978.

ARGUMENT

Proper to admit the confession of a juvenile who initially refused to talk then changed his mind, the juvenile was only "feeling good" from some earlier drinking and admitted he understood his Miranda rights. State v. Roberson (App.Div. 2) 576 P.2d 531.

PRIOR CONVICTION

While copies of certified copies are hearsay, certified copies of certified copies of records that comply with Civil Rule 44 are not hearsay. Thus a certified copy of defendant's prison record which contained a certified copy of his conviction was properly admitted and sufficiently proved his prior conviction. State v. Greer, 576 P.2d 1004.

PROBATION CONDITION

A probation condition that a non-indigent repay the cost of his probation jail time was upheld since it reasonably brought home the cost of defendant's crime to society, was in effect a fine, the judge told defendant where it would go and it was not a tax or a method of enriching the county treasury. State v. Smith, 576 P.2d 533.

BURGLARY

Although defendant was invited on premises by victim, when defendant murdered victim, defendant's status as a mere licensee ceased and the privilege to be on premises lapsed, so defendant, who remained unlawfully on premises was properly convicted of burglary. (Consecutive 10 year sentence tacked on to life sentence imposed for the murder.) Tribbett v. Commonwealth (Ky.) 561 S.W.2d 662.

COMMENT ON SILENCE

Where defendant showed a willingness to talk to police, and continued to do so after his failure to respond to a single question, defendant could not be said to have invoked his right to remain silent; thus defendant's failure to answer single question did not constitute either a total or selective revocation of his earlier waiver of Fifth Amendment rights, and so, it was not error to allow testimony by officer as to the nonanswer. U.S. v. Lorenzo (9th Cir.) 570 F.2d 294.

CONSENT

A vomiting drunk's verbal refusal to take the breathalyzer test and his refusal to stand up to begin the test were sufficient to justify the arresting officer's judgment that defendant refused the test, and the trial court was wrong in substituting its judgment for that of the officers. The test is an objective test. Dolan v. Rust (Colo.) 576 P.2d 560.

POLYGRAPH

Mere mention of word polygraph by a prosecutor does not require a mistrial; here it was cured by instruction to disregard and by fact jury didn't know who asked the victim to take a polygraph or what the results were, if any. People v. Scotts (Mich.App.) 263 N.W.2d 272.

SEARCH & SEIZURE

An affidavit which stated that a baggage inspector with four years experience in checking baggage for contraband had informed the affiant that a black heavy suitcase containing a large object had leaked talcum powder, and that in the handler's experience talcum powder was commonly used to frustrate narcotics detecting dogs, was sufficient to establish probable cause to search the bag. State v. Hauser, (Wash.App.) 576 P.2d 420.

Mr. A: feeling deprived by society, decides to lash out by mugging Mr. B. in a dark alley.
Mr B: as a result of the beating loses his health, his job, his family and takes up window washing and begging.
Mr. A: is caught and sentenced to business management courses that enable him to become independently wealthy.
Mr. B: is waiting for Mr. A in a dark alley.
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ARSON

Arson is a general intent crime, so rejecting defendant's requested jury instruction that arson required a specific intent was correct. All that is necessary for an arson conviction is to show that the burning was done voluntarily, without excuse, justification, or bonafide claim of right. State v. Scott, 576 P.2d 1383.

COMPETENCY OF COUNSEL

Appellate court presumes that trial counsel was aware of the cases which made a motion to suppress useless, and that he chose not to make the motion. His only ineffectiveness was that the jury chose to believe the state's evidence. State v. Scott, 576 P.2d 1383.

BAIL

Waiver of extradiction by defendant, who had fled first jurisdiction after being admitted to bail and was subsequently arrested in second state, was not a "voluntary surrender" as contemplated by bond forfeiture statute. To be "voluntary", defendant must give himself up to authorities within sixty days. State v. Zylastra (Iowa) 263 N.W.2d 529.

DISCOVERY

Right of discovery belongs to defendant, not the defense attorney, and in absence of anything to indicate that substituted counsel ever communicated with defendant's original attorney or that information sought would not have been readily available from original attorney, no abuse of discretion was shown by court's denial of continuance sought by defendant on grounds that prosecutor, who had made disclosure to original attorney, had not responded to replacement counsel's request for discovery. Rowland v. State (Ark.) 562 S.W.2d 590.

DOUBLE JEOPARDY

An order denying motion to dismiss on double jeopardy grounds is a final order, and therefore appealable. Where defendant was denied right to appeal order and was subsequently tried, it is necessary to vacate trial conviction and first decide the double jeopardy motion. Moroyoqui v. U.S. (9th Cir.) 570 F.2d 862.

DRUGS & NARCOTICS

Unlike prohibition of possession of liquor or tobacco, prohibition of possession of marijuana is not unconstitutional. Nor is it unconstitutional to punish possession of marijuana more severely than the sale of barbituates or to punish free delivery of marijuana more severely than the sale of marijuana. State v. Mitchell (Mo.) 563 S.W.2d 18.

PRIVILEGE

Where witness married defendant prior to trial, and then asserted privilege and refused to testify, transcribed testimony of witness at defendant's first trial was properly read into evidence at second trial. Wells v. Commonwealth (Ky.) 562 S.W.2d 622.

ENHANCED PUNISHMENT - WEAPONS

The Kansas Supreme Court faces the issue squarely and holds that whether or not defendant used a gun during the crime is for the court and not the jury. The mandatory minimum prison sentence merely limits the range of authorized dispositions, does not add a new class of crimes, and does not add a new element or provide for an additional sentence. State v. Mullins (Kan.) 577 P.2d 51.

JUDGE

Judge's participation, which included questioning witness and suggesting to prosecutor how to rephrase questions objected to, was not prejudicial. Court was merely acting to elicit relevant evidence, and at times, clarify testimony or to expedite introduction of highly relevant evidence in a manner which would not compromise defendant's rights. Schultz v. State (Wisc.) 264 N.W.2d 245.

JURORS

To disqualify a prospective juror, he must have more than bias, or a fixed opinion, as to guilt or innocence of defendant, he must also have an opinion so fixed that it would bias the verdict the juror would render. Where jurors initially stated they would be prejudiced against defendant for showing an obscene movie, but later stated they could follow the law and the evidence, proper to allow the jurors to remain. Tidmore v. City of Birmingham (Ala.Cr.App.) 356 So.2d 231.

RADAR

The state's failure to produce the maintenance records of the radar device that clocked defendant was proper since the defendant failed to show that the material would have been favorable to his defense and offered no evidence to show that the device was defective. Mere speculation that the records might show a defect was insufficient; at best the records were just as likely to show the device was operating properly. State v. Spada, (Or.App.) 576 P.2d 33.

JURY

Status of prosecutor's dossier on jury members as work product (not if prosecutor has knowledge of criminal record of prospective jurors), whether it's disclosable (only if defendant cannot obtain information elsewhere and is thereby prejudiced) and whether nondisclosure is reversible error (not where no prejudice.) Couser v. State (Md.) 383 A.2d 389.

SEARCH & SEIZURE

An officer who stopped a man matching the description of an armed robbery suspect violated Oregon's stop and frisk statute when he reached directly into a pocket the defendant was preventing him from frisking. However, the drugs that were seized from the pocket were not suppressed because the officer was acting in good faith with a proper motive (self-protection) and it is doubtful that exclusion would deter other officers in a similar situation. State v. Fairley (Or.App.) 576 P.2d 38.

Exigent circumstances justifing warrantless search and seizure existed where police entered defendant's premises in response to police officer's call reporting sniper fire directed at police officer. They had reasonable grounds to believe that the danger would increase if they announced their presence and intention. A list of considerations in determining exigent circumstances is provided and discussed briefly. State v. Max (S.D.) 263 N.W.2d 685.

VALUE

When items are stolen from wholesaler, the price at which the wholesaler offered them for sale ordinarily establishes the market value of the items. Where the defendant offered no rebuttal evidence, the invoice price was sufficient to withstand a motion for a directed verdict and get the case to the jury. State v. Callaghan (Or.App.) 576 P.2d 14.

VOLUNTARINESS OF STATEMENTS

Even though defendant suffered various injuries while resisting arrest, evidence that he refused hospital treatment, never requested medical treatment during the intermittent interrogation, and was rational and alert during the interrogations was sufficient to support the court's finding that the confession was voluntary. Commonwealth v. Williams (Pa.) 382 A.2d 1202.

WITNESSES

Where six year old victim, still under domination and nervous excitement of abusive sex act occurring two hours earlier, related particulars of that act to her mother at earliest opportunity, mother's repetition of such utterances was admissible as spontaneous exclamation exception to hearsay rule. State v. Duncan (Ohio) 373 N.E.2d 1234.

APPLICATION OF NO PAROLE AND NONDANGEROUS OFFENDER PROVISONS IN CRIMINAL SENTENCING. Sections 95-2206(3)(b), 95-2206.16, and 95-3214.

The Attorney General's office has learned of several instances of the application of the 1977 no parole sentencing provision (§95-2206(3)(b)) and nondangerous offender designation (§95-2206.16) to defendants sentenced for crimes which were committed prior to the effective date of the statutes.

Section 95-2206(3)(b) provides:

> Whenever the district court imposes a sentence of imprisonment in the state prison for a term exceeding 1 year, the court may also impose the restriction that the defendant be ineligible for parole and participation in the prisoner furlough program while serving his term. If such a restriction is to be imposed, the court shall state the reasons for it in writing. If the court finds that the restriction is necessary for the protection of society, it shall impose the restriction as part of the sentence and the judgment shall contain a statement of the reasons for the restriction.

§95-2206.16 provides:

> (1) The sentencing court shall designate an offender a nondangerous offender for purposes of eligibility for parole under 95-3214 if:
>
> (a) during the 5 years preceding the commission of the offense for which the offender is being sentenced, the offender was neither convicted of nor incarcerated for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed; or
>
> (b) the court has determined, based on any presentence report and the evidence presented at the trial and the sentencing hearing, that the

> offender does not represent a substantial danger to other persons or society.
> (2) A conviction or incarceration may not be considered under subsection (1)(a) if:
> (a) the offender was less than 18 years of age at the time of the commission of the present offense; or
> (b) the offender has been pardoned for the previous offense on the grounds of innocence or the conviction for such offense has been set aside in a postconviction hearing.

Application of Section 95-2206.16 is tied to §95-3214, which provides in relevant part:

> (1) Subject to the following restrictions, the board shall release on parole by appropriate order any person confined in the Montana state prison, except persons under sentence of death and persons serving sentences imposed under 95-2206(3)(b), when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community:
> (a) No convict serving a time sentence may be paroled until he has served at least one-half of his full term, less the good time allowance provided for in 80-1905; except that a convict designated as a nondangerous offender under 95-2206.16 may be paroled after he has served one-quarter of his full term, less the good time allowance provided for in 80-1905. Any offender serving a time sentence may be paroled after he has served, upon his term of sentence, 17 1/2 years. (Emphasis added.)
> * * *

The no parole provision of §95-2206(3)(b) and the requirement that prisoners, except those prisoners designated as nondangerous, serve one-half time before becoming eligible for parole were enacted by the 1977 legislature and made effective on July 1, 1977. However, the Attorney General has learned of several cases in which either a condition of no parole or an express finding that a defendant is a dangerous offender

has been made by sentencing in connection with crimes committed prior to the effective dates of the statutes. These sentences have been challenged on ex post facto grounds.

After researching the matter, the staff of the Attorney General's office concluded that these provisions cannot be applied retroactively to crimes committed prior to July 1, 1977.

Section 95-2206(3)(b) cannot be so applied as a matter of statutory law. Section 12-201, R.C.M. 1947, provides that, "No law contained in any of the codes or statutes of Montana is retroactive unless expressly so declared." A retroactive statute has been defined in Butte and Superior Mining Co. v. McIntyre, 71 Mont. 254, 263, 229 P. 730 (1924);

> A statute which takes away or impairs vested rights, acquired under existing laws or attaches a new disability, in respect to transactions already past, is deemed retroactive.

The no parole and nondangerous offender provisions must be deemed to be new disabilities and since no express provision was made by the legislature for retroactive application of §95-2206(3)(b), the general rule of non-retroactivity applies. Section 95-2206(3)(b) is therefore applicable only to crimes committed after July 1, 1977.

However, the legislature expressly provided that §95-2206.16 "applies to any offenders after July 1, 1977", Laws of Montana (1977), ch. 340, §5. The language mandates the application of §95-2206.16 in all cases where sentencing occurs after July 1, 1977, irrespective of the date of the offense. The ex post facto question has therefore been considered in connection with this section.

As a general rule any statute which, as applied, enhances or makes more burdensome the punishment for a crime is an ex post facto law. State ex rel. Nelson v Ellsworth, 142 Mont. 14, 380 P.2d 886 (1963). In Ellsworth the Montana Supreme Court struck down as ex post facto the application of a statute which cut back on good time provisions which were available to persons serving sentences of imprisonment at the time the petitioner committed his crimes. Under the old statute petitioner would have been eligible for parole in January of 1963; under the new statute he was not eligible until October 1965. The petitioner alleged that he should have the benefit of the more liberal good time provisions which were in effect at the time he committed the crime, and the Montana Supreme Court agreed.

The Attorney General's staff has been unable to logically distinguish the present situation from that in Ellsworth. In addition, there are cases from other jurisdictions which, in general, adopt the reasoning of Ellsworth. Several are cited in an Amicus brief filed by the ACLU in a case appealed to the Montana Supreme Court and remanded for resentencing by stipulation of all parties. The remand was agreed to only after prior consultation with the sentencing judge and by means of a stipulation vacating sentence and remanding for resentencing.

The only distinguishing characteristic in the case of §95-2206.16 is the fact that the section is made applicable to all sentencing procedures occurring after July 1, 1977. It can therefore be argued that persons committing crimes after April 8, 1977 (the date for enactment) but prior to the July 1 effective date of the provision were on notice that they would be subject to the section if sentenced after July 1 and that therefore the provision can be applied to offenses committed after April 8, 1977 without violating the ex post facto prohibition. However, this limited argument can be challenged on equal protection grounds since persons comitting crimes between April 8 and July 1 who happen to have been sentenced prior to July 1 would receive benefit of the more lenient provisions in effect prior to July 1. Several County Attorneys have been consulted concerning §§95-2206(3)(b) and 95-2206.16, and they agree with our conclusions.

Any information or arguments which might reasonably support the constitutionality of the application of these two provisions to crimes committed prior to July 1, 1977 is solicited by the Attorney General's office. However, unless new arguments and legal support are forthcoming, we recommend to all County Attorneys that they identify all cases with retroactive problems and bring them to the attention of the district courts.

At the present time we are involved in a compilation of authority on the subject and are preparing a sentencing checklist. These materials will be provided to all county attorneys at the annual meeting as they will not be complete until that time. In the meantime, if you have any questions don't hesitate to call Mike McCarter (449-2026) or Marc Racicot (449-2026).

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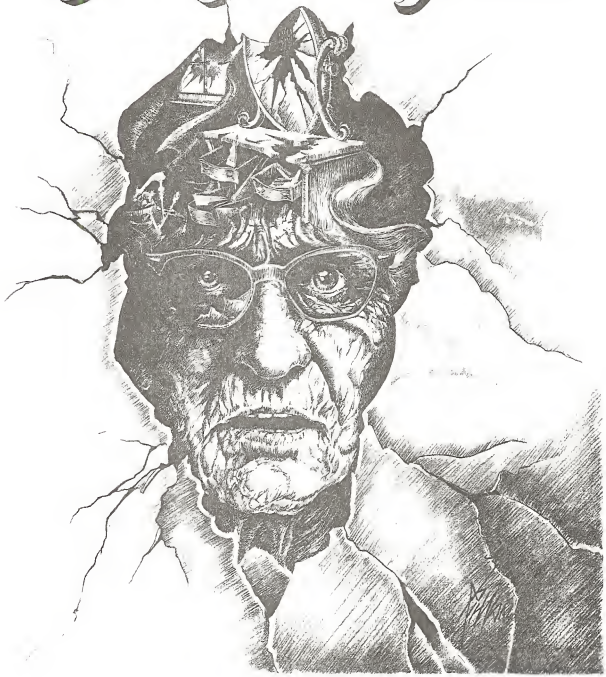

CRIMES AGAINST THE ELDERLY

BY

GEORGE DEUKMEJIAN*

It happens in virtually every major city in the United States. It happens any time young hoodlums or gangs go on the prowl looking for "crib jobs" . . . older victims who are unable to give them resistance. So, the aged, those citizens who deserve respect, instead become prey for the predatory youth gangs.

Recently, before a U.S. Senate Judiciary Subcommittee on Juvenile Delinquency, a frail, 83-year-old woman told how she was attacked by youths as she was entering her New York apartment. She was beaten and choked into unconsciousness, then robbed of what was left of her Social Security check, recently cashed.

That same hearing was told that Los Angeles is among the major American cities with especially serious youth gang problems, but it is not alone. We know of instances over the years where so-called "wolf packs," a pseudonym for predatory gangs, took apparent delight in attacking older citizens in Oakland.

Some Oakland victims were terrorized and brutalized more than once. These people were in their 70s and 80s, for the most part, and could put up no defense. They suffered severe beatings, stabbings, even violent forcible rape. They usually were women, adding to their already frail condition and, thus, even physically weaker than their male counterparts.

A newspaper columnist in my city of Long Beach informed me that he recently interviewed an elderly lady who told him she has not left her apartment in three years for fear that she may get mugged.

Some of the testimony in that recent Washington hearing reinforced what we have been hearing for the last few years. For instance, the most common reason for attacking old people "is because they're there, and because they're easy."

Thus, the National Council of Senior Citizens has recommended programs for older citizens who live in urban areas, including education on how to avoid and prevent crime, victim assistance payments and programs to rebuild neighborhoods.

In Hollywood, California, known for its glitter, glamor and film imagery, it has been a far different story for senior citizens who live in that area. They have not only been threatened with physical violence, but the area has become a haven for prostitution, homosexuals, pornography stores and the like, hardly a fit atmosphere for an older person trying to live in a dignified, quite manner.

It wasn't until very visible action was taken by the Los Angeles Police Department that so-called massage parlors were cleaned up. These places were merely fronts for prostitution operations. And, even more recently, the State Department of Alcoholic Beverage Control (ABC) took legal action against several bar owners in an effort to clean up lewd and lascivious actions occurring in and around those places.

But that and other neighborhoods still need considerable rehabilitation and are not really safe places in which senior citizens can live and walk the streets without severe anxiety. As that 83-year-old witness said: "Living in terror is a terrible thing for older people while they are passing their last days."

I couldn't agree more. That's why I authored a law last year to deny probation for persons convicted of seriously injuring the aged and severely disabled. I wanted our State to send out a very loud, very clear message that we will not tolerate these cruel attacks on older citizens.

That law also makes it easier to prosecute as adults, 16- and 17-year-olds who are arrested for such offenses. This California law offers important protection for potential victims who are least able to defend themselves because young criminals, convicted of these cowardly crimes, must be removed from the community.

As we again recognize "Forgotten Victims Week" this year, I particularly want our older citizens to know that they are no longer being forgotten by many of us charged with trying to give them the greatest protection we can. I hope the attention that is focused upon the problem of "Crimes Against The Elderly" will offer the hope and opportunity for our senior citizens to live out their lives in peace and dignity.

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*George Deukmejian is a member of the Senate from Long Beach, an attorney and former member of the Assembly.

VIOLENCE

& YOUTH

YOUTH CRIME: A NATIONAL SHAME

BY

ALISTER MCALISTER*

Youth crime is becoming a national shame and it is producing more than its share of tragic victims. More than half of all serious crime in the United States is committed by youths aged ten to seventeen. Since 1960, juvenile crime has risen twice as fast as that of adults.

The juvenile justice system, a sieve through which most youthful offenders come and go, with neither punishment nor rehabilitation, has become a big part of the problem. The system evolved over the past several decades on the theory that there is no such thing as a bad boy, or at least none beyond salvage.

Records of juvenile crime are confidential and are destroyed when the youthful offender becomes a legal adult. By this process, the benifits to be derived from public denunciation of savage crime are largely lost on juvenile offenders.

What we need, is a reorganization of our priorities, with greater emphasis on the rights of juvenile crime victims. Once we recognize that potential victims are as much entitled to protection of their right to life and personal security against invasion by juveniles as against adults, we can begin to fashion a juvenile system that works.

Concepts of confidentiality for juvenile criminal transgressions that may make sense when dealing with petty offenses are highly inappropriate for rape, murder and other violent crimes. Greater visibility and accountability are needed.

To serve these ends, I introduced Assembly Bill 2209, to assure that Youth Authority parole hearings would be open to public view with adequate notice and a permanent record that can be the subject of public scrutiny.

Assembly Bill 2209 also addresses another problem.

From 1941, when the California Youth Authority was formed, until 1966, a large share of its inmates were non-criminals, such as runaways and school truants.

Then, in 1966, the state started giving financial incentives for local handling and parole of non-serious offenders. And, in 1976, another law prohibited incarceration of runaways and truants.

As a result, CYA's population has become "hard core." In 1966, 70 percent of CYA inmates were between 8 and 17 years old. Now, more than 70 percent are between 17 and 25.

Also, in 1966, only 15% of CYA inmates were there because they had committed violent crimes (homicide, robbery or assault). The figure for violent offenders today is 42%.

In 1966, 32 juveniles were committed to the Youth Authority for homicide. In 1976, 152 were committed for homicide, an increase of 475%.

If the Youth Authority is to continue to deal with crimes of violence by relatively mature offenders, they need to give public safety greater attention. Assembly Bill 2209 would require that a juvenile convicted of a violent crime serve a sentence comparable to the minimum to be served by an adult offender, unless the authority concludes that public safety would not be endangered by earlier release.

Senator George Deukmejian has addressed the same problem in a somewhat different fashion. He has introduced Senate Bill 1396 to prohibit courts from sending convicted persons, 18 years of age and older, to the California Youth Authority.

Whichever approach the legislature elects to follow, it is clear that the victim consequences of serious violent juvenile crime needs close examination and prompt action.

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*Alister McAlister is a member of the Assembly from San Jose, lawyer and former law school professor.